Public Prosecutor v Chong Vui Phin

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KCH-41–83/12 OF 2011
YEW JEN KIE J
4 JANUARY 2012

Criminal Law — Giving false information to police officer — False police report — Allegation of being hit — Accused charged in magistrate's court — Accused acquitted and discharged — Appeal by prosecution — Whether magistrate fell into error in arriving at decision — Penal Code s 182

Criminal Procedure — Appeal — Against acquittal and discharge — Evidence — Whether magistrate fell into error in refusing to accept oral testimonies of prosecution's witnesses — Whether oral testimonies of prosecution's witnesses must be corroborated with documentary evidence to establish prima facie case

The present appeal arose from the magistrate's court where the respondent ('the accused') was acquitted and discharged of the offence under s 182 of the Penal Code ('Code') for making a false police report. Briefly, the facts were that Sergeant Thomas Jitom ('PW1'), had received a report from the accused while he was on duty at the One Stop Center IPD, Kuching. The accused made a report that at 3.30pm on 15 October 2009, in Wonderful Central Park, a man known as Soo Say Thong ('PW2') had threatened to hit and kill him. It was PW2's defence that on the said date and time, he had went to the IPD Kuching to meet ASP James ('PW3') and Inspector Zuriawati ('PW5') regarding a criminal case. PW2's alibi defence was supported by both PW3 and PW5 who each testified that at the particular date and time, PW2 was indeed with them. However, in arriving at his decision, the learned magistrate held that the prosecution ought but failed to adduce documentary evidences ie record of PW2's physical presence at IPD; the diary of PW3 to show that he had written down notes on his meeting with PW2; and the statement recorded by PW5 from PW2 to substantiate PW5's assertion that she had met PW2 on the said date. The learned magistrate further held that the tendering of the documents could have shed away all the doubts and prove to the court that PW2 was not at the Wonderful Centre Park on the date of the alleged incident and that by not tendering those documentary evidence, more doubts would only be shed as to why it was not tendered. Dissatisfied, the prosecution appealed to the present court, raising the main issue of whether the learned magistrate had fallen into error in refusing to accept the oral testimonies of the prosecution's

witnesses and by holding that there must be documentary corroborative evidence from the prosecution's witnesses to establish a prima facie case.

Held, allowing the appeal:

(1) The prosecution had adduced ample credible evidence to prove every ingredient of the charge and to establish a prima facie case against the accused. The learned magistrate ought to have called upon the accused to enter his defence (see para 19).

(2) The alibi of PW2 had shown that he could not have been at the Wonderful Central Park and, therefore, the report was a false one (see para 18(c)).

(3) By calling PW1 to PW5, the prosecution had complied with the best evidential rule by adducing through the oral evidence of these witnesses who had met with PW2 at the material time. What the learned magistrate ought to have done was to sieve through the evidences of PW1 to PW5 and decide whether there was any sufficient credible evidence, though not conclusive, to prove the ingredients of the charge. The learned magistrate had fallen into error by imposing a degree of 'shedding away all the doubts' which was contrary to the established burden of proof in criminal law (see para 18(e) & (g)).

(4) There was no reason for the learned magistrate not to believe the testimonies of PW1 to PW5. PW2 was not a stranger to PW4 and PW5. It was not unreasonable for them to be able to remember meeting PW2 at the material time amidst the many people whom they met in the course of the day's work. The purpose of documentary evidence, if produced, would only serve as corroboration and refreshment of memory. Failure to produce it should not be considered as fatal (see para 18(h)).

[Bahasa Malaysia summary

Rayuan ini berbangkit daripada mahkamah majistret di mana responden ('tertuduh tersebut') telah dilepaskan untuk kesalahan di bawah s 182 Kanun Jenayah ('Kanun') kerana membuat laporan polis yang palsu. Dengan ringkas, fakta-fakta adalah bahawa Sarjan Thomas Jitom ('PW1'), telah menerima laporan daripada tertuduh semasa dia bertugas di Pusat One Stop IPD, Kuching. Tertuduh membuat laporan bahawa pada 3.30 petang 15 Oktober 2009, di Taman Wonderful Central, seorang lelaki dikenali sebagai Soo Say Thong ('PW2') telah mengugut untuk memukul dan membunuhnya. Adalah menjadi pembelaan PW2 bahawa pada tarikh dan waktu tersebut, dia telah pergi ke IPD Kuching untuk bertemu dengan ASP James ('PW3') dan Inspektor Zuriawati ('PW5') berkenaan dengan kes jenayah. Alibi pembelaan PW2 disokong oleh kedua-kedua PW3 dan PW5 yang mana memberi testimoni bahawa pada tarikh dan waktu tersebut, PW2 sememangnya bersama dengan mereka. Walau bagaimanapun, dalam membuat

keputusannya, majistret yang bijaksana memutuskan bahawa pihak pendakwaan seharusnya tetapi gagal untuk mengemukakan keterangan dokumentar iaitu rekod kehadiran fizikal PW2 di IPD; diari PW3 yang menunjukkan bahawa dia telah menulis nota-nota semasa perjumpaan dia dengan PW2; dan kenyataan yang direkod oleh PW5 daripada PW2 untuk menyokong penegasan PW5 bahawa dia telah bertemu dengan PW2 pada tarikh tersebut. Magistret yang bijaksana selanjutnya memutuskan bahawa dengan mengemukakan dokumen-dokumen syak wasangka dapat diterangkan dan membuktikan kepada mahkamah bahawa PW2 tidak berada di Taman Wonderful Centre pada tarikh kejadian yang dikatakan dan bahawa dengan tidak mengemukakan keterangan-keterangan dokumentar tersebut, lebih banyak syak wasangka dapat diterangkan tentang mengapa ia tidak dikemukakan. Kerana tidak puas hati, pihak pendakwaan telah membuat rayuan kepada mahkamah ini, membangkitkan isu utama sama ada majistret yang bijaksana telah terkhilaf dengan keengganan untuk menerima testimoni lisan saksi-saksi pendakwaan dan dengan memutuskan bahawa keterangan menyokong dokumentar daripada saksi-saksi pendakwaan untuk mewujudkan kes prima facie.

Diputuskan, membenarkan rayuan:

(1) Pihak pendakwaan telah mengemukakan keterangan boleh dipercayai yang banyak untuk membuktikan setiap unsur tuduhan dan mewujudkan kes prima facie terhadap tertuduh. Majistret yang bijaksana seharusnya meminta tertuduh untuk memasukkan pembelaannya (lihat perenggan 19).

(2) Alibi PW2 menunjukkan bahawa dia tidak mungkin berada di Taman Wonderful Central dan justeru, laporan tersebut adalah palsu (lihat perenggan 18(c)).

(3) Dengan memanggil PW1 hingga PW5, pihak pendakwaan telah mematuhi peraturan keterangan terbaik dengan mengemukakan melalui keterangan lisan saksi-saksi yang telah bertemu dengan PW2 pada masa matan. Apa yang seharusnya dilakukan oleh majistret yang bijaksana adalah menyaring keterangan PW1 hingga PW5 dan memutuskan sama ada terdapat apa-apa keterangan yang mencukupi, walaupun tidak konklusif, untuk membuktikan unsur-unsur tuduhan. Majistret yang bijaksana telah terkhilaf dengan mengenakan tahap 'shedding away all the doubts' yang mana adalah bercanggahan dengan beban pembuktian yang telah wujud di dalam undang-undang jenayah (lihat perenggan 18(e) & (g)).

(4) Tidak terdapat sebarang sebab bagi majistret yang bijaksana untuk tidak mempercayai testimoni PW1 hingga PW5. PW2 bukanlah orang asing kepada PW4 dan PW5. Adalah tidak berpatutan bagi mereka untuk mengingati perjumpaan PW2 pada masa matan di kalangan orang yang

A mereka temui semasa hari bekerja. Tujuan keterangan dokumentar, jika dikemukakan, hanya dapat dijadikan sebagai sokongan dan mengimbau memori. Kegagalan untuk mengemukakannya tidak dianggap sebagai kemudaratan (lihat perenggan 18(h)).]

B **Notes**

For cases on against acquittal and discharge, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 198–199.

Cases referred to

C *Bala Anak Matik v PP* [2006] 3 MLJ 516, CA (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678; [1998] 4 CLJ 209, HC (refd)

Legislation referred to

Criminal Procedure Code s 173(f)(i)
D Penal Code ss 182, 183, 354

Nur Nisla bt Abd Latif (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Fung Lee Fook (Fung Lee Fook Advocates) for the respondent.

E

Yew Jen Kie J:

[1] This is the appeal against the decision of the learned magistrate, given on
F 6 December 2011, in acquitting and discharging the respondent of an offence under s 182 of the Penal Code at the conclusion of the prosecution case.

[2] For convenience, I shall refer to the parties as they were in the magistrate's court.

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[3] In the Magistrate's Court at Kuching, the accused was charged with an offence under s 182 of the Penal Code, which reads:

> Bahawa kamu pada 15.10.2009 jam lebih kurang 1544 hrs bertempat di Pejabat
H Pertanyaan Balai Polis Sg. Maong, di dalam Daerah Kuching di dalam Negeri Sarawak, telah membuat satu laporan Polis Sg. Maong RPT/3938/09 bertarikh 15/10/09 dengan setahu kamu atau mempunyai sebab dipercayai laporan itu adalah laporan palsu. Oleh yang demikian kamu telah melakukan kesalahan jenayah yang boleh dihukum di bawah Seksyen 182 Kanun Keseksaan.

I

THE ISSUE

[4] The main complaint in the appeal is essentially this: whether the learned magistrate had fallen into error in refusing to accept the oral testimonies of the

prosecution's witnesses and by holding that there must be documentary corroborative evidence from the prosecution's witnesses to establish a prima facie case.

THE APPEAL

[5] The prosecution's case against the accused is unfolded through Sergeant Thomas Jitom ('PW1'), who testified that on 15 October 2009 at about 6.40pm, while he was on duty at the One Stop Center IPD, Kuching, he received a report from Chong Vui Phin (whom PW1 identified as the accused in the dock) that on 10 October, 2009 at around 1530 hours at his stall at Wonderful Central Park, a man known to him as Soo Say Thong had threatened to hit and kill him. The police report was marked as exh P1.

[6] PW1 visited the scene of crime the next day together with the accused.

[7] The next day, PW1 interviewed PW2 (Soo Say Thong). PW1 testified:

> Di dalam percakapan Soo Say Thong dia menyatakan tarikh dan semasa masa kejadian dia berada di IPD Kuching untuk berjumpa beberapa pegawai iaitu ASP James Jonathan, Ins. Zuriawat dan Sarjan Apeng. Saya telah menyiasat alibi Soo Say Thong dengan merakamkan kenyataaan saksi 2 tersebut dan mereka telah mengesahkan Soo Say Thong semasa kejadian berada di IPD Kuching.

[8] PW2 told the court that on 15 October 2009 at about 3.30pm, he went alone to the IPD Kuching to meet ASP James ('PW3') regarding a criminal case under s 354 involving him. After meeting PW3, the latter referred him to a lady Inspector Zuriawati ('PW5'), with whom he spent half an hour. Thereafter he went to the One Stop Center at the IPD to meet PW1 and Sergeant Apeng and was there for 45 minutes until 5pm. He went home after that. At between 6–7pm while he was in the house, he received a telephone call from PW1 who asked him to go back to the One Stop Center to give a statement regarding a report made against him. He met PW1 that same evening at 7.30pm.

[9] In cross-examination, PW2 was asked why he was so sure he went to see PW3 on 15 October, 2009 and not on other date, he replied:

> I can remember because after I was released from magistrate Tuan Maris Agon and contacted Puan Zariawati. I still remembered because I was remanded for 3 days and released and went to meet Tuan James. I was released from remand on 12th October 2009 and three days after that I met Tuan James at IPD.

[10] PW2 further narrated in cross-examination as to what happened when he went back in the evening to see PW2 regarding the report made against him:

> Upon arrival at IPD I met one Chinese male by the name Chong Vui Phin together with Sarjan Thomas, after Sarjan Thomas asked me whether I threatened the said Chinese male, I asked him back when and what date as well as time the incident happened and was informed by Sarjan Thomas that it happened on that day itself. Sarjan Thomas told me around 3-4 pm and I told him that at that time and date I was in IPD at office block 3, Puan Zuriawati's room for my statement to be recorded.

[11] PW3 testified that on 15 October 2009 at about 3pm while he was at work at the second floor, Block C, IPD Kuching, PW2 came alone to see him regarding some people registering a certain phone number in his name. PW3 referred PW2 to PW5, who was on the first floor of Block C to record a statement from PW2. PW3 said that PW2 was with him for approximately 20 minutes.

[12] PW3 also said that on 15 October 2009 at around 4.30pm. PW1 came to see him regarding a report that was made against PW2 for having threatened the accused and he wrote it down in his official diary, which was given to PW1. PW3 also gave a statement to PW1 on a date which he could not now remember. PW3 was very certain that he met PW2 on 15 October 2009 at 3pm and that PW2 went to see PW5 after meeting him.

[13] PW5 told the court that on 15 October 2009 at about 3.30pm she met PW2 alone in her office for about one hour. PW5 said in cross-examination that she was certain it was 15 October 2009 based on the diary. She also recorded a statement from PW2 that was stated in the investigation paper.

[14] PW4 (Sergeant Apeng ak Po'oh) testified that on 15 October 2009 at around 4pm PW2 came to the One Stop Centre alone and he was not there for a long time.

[15] In his judgment, the learned magistrate commented on the failure on the part of the prosecution in adducing documentary evidence, which, the learned magistrate said, 'could support and create much stronger case as to PW2 presence in IPD on the afternoon of 15 October 2009'.

[16] The documentary evidence which the learned magistrate said the prosecution ought to have produced are:

(a) record of PW2's physical presence at IPD (to show that PW2 had indeed come to IPD on 15 October 2009 and met PW1, PW3 and PW5);

(b) the diary of PW3 to show that he had indeed written down notes on his meeting with PW2. The learned magistrate was of the view that the production of the diary was 'crucial' as PW3 seemed unsure of what he

did the day before 15 October 2009 and the day after. The learned magistrate said that without the diary PW3's testimony is 'clouded with doubt and just merely an oral statement' and

(c) the statement recorded by PW5 from PW2 to substantiate PW5's assertion that she had indeed met PW2 on 15 October 2009.

[17] Commenting on the necessity to tender the above documentary evidence, the learned magistrate said: 'With the tendering of those document it can shed away all the doubts and prove to the court that PW2 was not at the Wonderful Centre Park on the date of the alleged incident. By not tendering those relevant documentary evidence will only shed more doubts as why it was not tendered.'

[18] In my judgment, the appeal ought to be allowed. My reasons are:

(a) pursuant to s 173(f)(i) of the Criminal Procedure Code, it is incumbent on the prosecution at the close of the case for the prosecution to make out a prima facie case against the accused. A good guide as to what constitute a prima facie case is found in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209 where it was held:

> 'prima facie' means on the face of it or at first glance. To me, in the light of the Amendment Act A979, perhaps the most appropriate definition of a 'prima facie case' could be found in the *Oxford Companion of Law*, which has it as: 'A case which is sufficient to call for an answer. While prima facie evidence is evidence which is sufficient establish a fact in the absence of any evidence to the contrary, but is not conclusive. It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected'.

(b) the essential ingredients of s 183 of the Penal Code are:

(i) giving of an information to a public servant;

(ii) the information must have been known or believed to be false by the giver;

(iii) that information must have been given with the intention to cause, or knowing it to be likely that it will cause, to believe that he is such a public servant;

(iv) to do or omit anything which he ought not to do or omit to do if the true facts were known to him, or

(v) to use his lawful power to the injury or annoyance of any person.

(c) essentially, the prosecution's case rests upon the alibi of PW2 which

shows that at the material time PW2 could not have been at the Wonderful Central Park and, therefore, the report about PW2 threatening to hit and kill the accused is a false report;

(d) in this connection, the prosecution had called five witnesses, PW1 to PW5, to show that PW2 was at the alleged time stated in the police report (exh P1) present at the IPD, Kuching, meeting with PW3 first, then PW5, followed by PW1 on 15 October 2009 from 3–6pm;

(e) in my judgment, by calling PW1 to PW5, the prosecution had complied with the best evidential rule by adducing through the oral evidence of these witnesses who had met with PW2 at the material time;

(f) the purpose of documentary evidence, if produced, only serves as corroboration and refreshment of memory, failure to produce it should not be considered as fatal see, *Bala Anak Matik v Public Prosecutor* [2006] 3 MLJ 516;

(g) what the learned magistrate ought to have done is to sieve through the evidence of PW1–PW5 and decide whether there is any sufficient credible evidence, though not conclusive, to prove the ingredients of the charge. The learned magistrate had fallen into error by imposing a degree of 'shedding away all the doubts' which is contrary to the established burden of proof in criminal law; and

(h) having perused the record of appeal, there is no reason, in my judgment, for the learned magistrate not to believe the testimonies of PW1–PW5. It is to be noted that PW2 is not a stranger to PW5 and PW4, and therefore it is not unreasonable for them to be able to remember meeting PW2 at the material time amidst the many people whom they met in the course of the day's work. Further, PW2 gave reasons why he was so certain it was on 15 October 2009 that he met PW3, PW4 and PW5, and his testimony is corroborated by PW3, PW4 and PW5. Also, the day PW3 met PW2 was the very same day PW1 went to inform PW3 at around 4.30pm about having received a report against PW2. It is in evidence that PW1 received the report on 15 October 2009. Further, there is no purpose for the police witnesses to support the alibi of PW2 if indeed PW2 had not met them on 15 October 2009 at the material time.

[19] In my judgment, the prosecution has adduced ample credible evidence to prove every ingredient of the charge and to establish a prima facie case against the accused. Thus the learned magistrate ought to have called upon the accused to enter his defence.

[20] Accordingly, the appeal is allowed. I hereby order that the order of

acquittal and discharge be hereby set aside and substituted with an order that the accused be called upon to enter his defence.

Appeal allowed.

Reported by Afiq Mohamad Noor